No. 10,807

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HILLCONE STEAMSHIP COMPANY (a corporation), SANTA CRUZ OIL COMPANY (a corporation), and ASSOCIATED INDEMNITY CORPORATION (a corporation),

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner of the United States Compensation Commission, for the Thirteenth District and ALBERT V. STEFFEN,

Appellees.

APPELLANTS' CLOSING BRIEF.

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REVIEW OF APPELLEES' STATEMENT OF THE CASE.

It is stated Mr. Steffen contended the plea of the statute of limitations was not good because his right to file a claim did not accrue until August, 1938, when he left work the second time, that the statute of limitations was extended by the amendment of June 25, 1938, as it was then the claim accrued, and that appellants are estopped to assert the plea of the bar of the statute of limitations.

Appellees contend the only issue, as they see it, is as to the bar of the statute of limitations, although the argument offered refers to the date of injury and several other points, which will be discussed herein.

COMMENT ON FACTS.

The facts have been generally stated in appellants' brief and we find no particular objection to the statement of facts relied upon by appellees, except we cannot agree that no time was lost before August 5, 1938. The man's testimony on pages 4, 5 and 6 of appellants' opening brief clearly shows that during that time he could not do any type of work, such as driving an automobile or acting as a watchman climbing off and on boats immediately after his injury. It definitely shows, particularly on page 6, he could not work in February, 1938, for at least three days and during that time obtained medical treatment, the responsibility for which would have been that of appellants, had he desired to press the claim therefor in the proceedings before the Deputy Commissioner. If he had done this of course there would have existed the situation of one obtaining treatment before there was an injury or before the start of the running of the statute of limitations.

STEFFEN'S CLAIM WAS BARRED BY THE STATUTE OF LIMITATIONS.

Appellees say Mr. Steffen's claim did not accrue until August, 1938, that the statute of limitations may be extended as to claims accrued but not barred, and appellants are estopped to assess the bar of the statute of limitations.

(a) Steffen's right to file claim for compensation accrued before August, 1938.

It goes without saying a compensation order includes determination of liability for medical treatment and that is based upon a claim. Any medical treatment for which Mr. Steffen therefore would wish reimbursement, which was obtained in February, 1938, would naturally have to presume and be predicated upon an injury.

The fact that Mr. Steffen is alleged to have had no right to claim compensation until after August, 1938, because it was not until then that he sustained a compensable injury, creates a definite paradox when 33 U. S. C. A. 906, Subdivision (a), is referred to. The record definitely shows that in February, 1938, Mr. Steffen suffered three days' disability for which he would have been entitled to compensation after he had been disabled more than forty-nine days after again leaving work on or about August 5, 1938. In other words, he later did become entitled to compensation for those three days but it was not paid him because on those days he received his salary. His salary then was compensation. If not received, the compensation to which he would have been entitled would have defi-

nitely created a situation of disability where compensation was payable.

Di Giorgio Fruit Corp. et al. v. Norton, 93 Fed. (2d) 119, applies to industrial diseases and not direct traumatic injuries where there was the acknowledgment of the existence of an injury and of continuous symptoms until a further period of total disability. This too was clearly distinguished by your Honorable Court in *Koblikin v. Pillsbury,* 103 Fed. (2d) 667, and in the case of *Marshall v. Pletz,* 1942 A. M. C., Vol. 1, 627, both of which have been covered in detail in appellants' brief.

Potomac Elec. Power Co. v. Cardillo, 107 Fed. (2d) 962, is of no aid to appellees, for therein it was said:

> "We need not decide whether the limitation began to run in 1936 . . ., or in 1937, when he learned that his disability was caused by the accident of 1935. On either view, his claim was timely."

It should be noted the employee in this case was injured on May 24, 1935, and was off two days, for which he was not paid compensation, and then did not lose time again until November 16, 1936. He first was told that his condition from which he suffered after 1936 was due to the injury of 1935 in the Spring of 1937, and he filed a claim on August 18, 1937, which was within one year of November 16, 1936, or when he was first then entitled to compensation for the first two days he was away from work in 1935. In the case at bar, however, Mr. Steffen left work the second time on August 5, 1938, and did not file his application or claim until January 20, 1941, more than two

years after he would have been entitled to compensation for the first three days of disability in February, 1938.

These cases, along with that of *Kropp v. Parker,* 8 Fed. Supp. 290, have been clearly covered by your Court in the *Koblikin* case, wherein it was said the *Di Giorgio Fruit Corp.* case and the *Kropp* case dealt with industrial diseases and not injuries.

Much is made of the so-called *Glantz* case, otherwise known as *Continental Cas. Co. v. Ind. Acc. Com.,* 11 Cal. App. (2d) 619, to which appellants referred in their opening brief. That case, when it is read, will show it was applied to a set of circumstances and conditions as if applicable to the development of a situation of industrial disease or where the first knowledge that a previous incident had caused the condition suffered was obtained at a much later date. All this was discussed and distinguished and disposed of and made clearly not applicable at bar by the *Koblikin* and *Pletz* cases, supra.

(b) The statute of limitations may not be extended to claims accrued for the creation of liability and responsibility unless intention of the Congress or the legislative body clearly and unequivocally expresses an intention so to do.

We have no argument as to the extent of the decisions in *South Chicago Coal & Dock Co. v. Bassett,* 309 U. S. 251, 84 L. Ed. 732, and *Binkley Mining Co. v. Wheeler,* 133 Fed. (2d) 863, but we cannot see where they are of any aid and assistance for the problem here presented. The same comment goes to *Ayers v. Parker,* 15 F. Supp. 447, and *Terminal Shipping Co. v. Branham,* 47 F. Supp. 561.

We do not believe, as appellees contend, that a Legislature has the power to increase the period of time necessary to constitute a limitation and make it applicable to existing causes of action, providing it is made before the cause is extinguished. We submit that where such is attempted there must at least be a legislative showing and statement of intent to make such provision retroactive.

46 *A. L. R.* 1101 is of no aid because of the statement just made.

It is said that *Davis & McMillian v. Ind. Acc. Com.,* 198 Cal. 631, cited as 641, should be governing because Mr. Steffen was injured in California. This case, however, merely stated that the Legislature had the power to extend the time before an action was outlawed. This case goes to the extent to say that the limitation of time may be extended for the employee, but does not discuss the situation from the point of view of restricting the time insofar as the employer or employer's insurance carrier is concerned. It should be noted also that the extension of the statutory period as covered by the *Davis & McMillian* case went only to the right to compensation. In this case it was said it was evident that the California statute was intended to extend the period of limitation to cases accrued, but in the case at bar no such assumption may be made and especially so in view of the cases which have been cited by appellants and not denied by appellees. All the *Davis & McMillian* case held was as stated therein:

> "The Legislature has full control over the mode, times, and manner of prosecuting suit; and when-

> ever, upon consideration of an entire statute relating to these matters, it appears to have been the legislative intent to make it retroactive, it will be given this effect."

We ask where in the case at bar, and where in the legislative enactment particularly pertinent, is there shown to be any intent for the lawmakers to make it retroactive.

Paramino Lbr. Co. et al. v. Marshall, 309 U. S. 370, would seem to be the primary authority relied upon by appellees. This case, however, was one where the limitations of time had run against a claim and the Congress, by direct legislation, waived the limitations placed against the trial of the action and instructed the Deputy Commissioner to hear and redetermine the matter. This case admitted there was such a thing as the statute of limitations which barred the claim.

In this case the appellee in 1931 fractured a rib and during his disability was paid compensation, there being a determination he was wholly disabled to July 4, 1931. No proceedings for review were requested, and about five years later legislative order was made for the review of the appellee's case as aforesaid. The Court said by legislative enactment when there was the intent expressed, a statutory bar could be waived providing the legislation showed the intent to be retroactive. This had to be done by a special act.

The Court said that the action taken was merely to cure the fault of administration. This clearly sustains appellants in saying that to make enactments retro-

active there must be a legislative intention and direction to make it so because mere silence is not sufficient.

We have no argument with the contention that such an enactment could be made retroactive, but until there is an intention expressed that it was so intended, it is not retroactive and we fail to find from any of the citations offered by appellees any support for the contention that without definite direction such an enactment is retroactive.

Reference to *South Chicago Coal & Dock Co. v. Bassett,* 309 U. S. 251, 84 L. Ed. 732, goes not to a situation as here but concerns definition of the term "crew", and in no way goes to the question of whether a statute of limitations provision must be strictly construed. This case says nothing about such a statute being retroactive in its effect or otherwise.

Binkley Mining Co. v. Wheeler, 133 Fed. (2d) 863, refers to a coal code for the purpose of regulating those engaged in coal mines, and we can find nothing in it which applies to the case at bar, and particularly the enactment discussed therein in no way shows there was any contention it was retroactive.

Orton v. Olds Motor Works, 240 N. Y. S. 570, supports us because therein there was approval to a provision that a statute of limitations could be extended from one to two years providing there was the approval of such extension by the board involved in the administration of the Act. In other words, there was the definite expression that where the statute was extended from one to two years, it was intended to have

retroactive effect if and when the board involved so ordered and approved, but not otherwise. There must have been some reason for putting this provision in and we say the answer is in the cases which we have cited to the effect that no retroactive effect in such instances is to be assumed but must be definitely provided for.

New Amsterdam Cas. Co. v. Cardillo, 108 Fed. (2d) 492, is of no help either. There one suffered a hernia in 1931 and was ordered treatment and compensation from August 2, 1932 to August 9, 1937. The help that comes from this case is to appellants' contention. It concerns the amendment to the Longshoremen's Act providing for the reopening of cases under certain circumstances, and holds that such a provision would not be retroactive in effect unless by the very provision itself, such was shown to be the case. The Court said:

> "The language of the amendment definitely indicates the intention of Congress to make it both retroactive and prospective, . . ."

For the foregoing reason, therefore, *Bethlehem Shipbuilding Corp. v. Cardillo,* 102 Fed. (2d) 299, is no authority to show that the section with which we are concerned was retroactive in its effect. In the *Bethlehem* case, it was said the wording of the section showed it to be intended to be retroactive and does nothing more than refer to the same principles for support as does *New Amsterdam Cas. Co. v. Cardillo,* 108 Fed. (2d) 492.

Carscadden v. Territory of Alaska, 105 Fed. (2d) 377, is where there was a reduction of a limitation from ten to seven years. The Court said the interpretation with respect to the right of time of amendment depends on the apparent intent of the Legislature. We ask again where in the case at bar there is any apparent intent to make the provision discussed retroactive?

Does it not also seem that in many of the cases upon which appellees rely we find proof and support for your appellants' contentions?

(c) Appellants are not estopped to assert the plea of the bar of the statute of limitations.

That there is no equitable estoppel in longshoremen and harbor workers' cases was clearly held in the case of *Marshall v. Pletz,* 1943 A. M. C. 9, which is a decision of our Supreme Court, and we ask that your Honorable Court read it.

COMMENTS ON APPELLEES' ANALYSIS OF APPELLANTS' OPENING BRIEF.

The documentary evidence heretofore referred to shows that Mr. Steffen lost time in February, 1938, and that compensation is payable from the date after the injury if more than forty-nine days' disability are suffered, and that certainly was the case here.

We take no argument with the statement that the statute of limitations must be plead as a defense, and is waived if not plead at the first hearing, but we

submit on the other hand, as was pointed out in appellants' brief, for the right to compensation to come into existence, if payment was not made, the employee had to file a claim. If the payment of the three days' wages in February, 1938, was the payment of compensation, then the application for benefits and hearing filed in 1941 cannot be considered as a petition to reopen because it was filed more than one year after the last payment of compensation in February, 1938. See 33 *U. S. C. A.*, Section 922.

Appellees say we have cited only one case to show that a statute of limitations is not retroactive when extended, unless it expressly so states, when they have cited no cases to show we are incorrect in our contention and have made no comment or answer to the points covered in appellants' brief under the captions "The Right to Compensation Arises Out of a Contract and the Right Begins With and Depends Upon the Existence of a Cause or Right of Action"; "The Date of Injury"; "Is Section 930(f) Retroactive?", and "Decisions On Similar Questions".

Appellees say that the statute of limitations is only remedial in character, but does not go to the jurisdiction, and cases cited by appellees support such conclusion. This statement we cannot agree with, and fail to find any support of such contention in the cases cited.

To get away from the case of *Koblikin v. Pillsbury, et al.*, 103 F. (2d) 667, which has been analyzed and discussed in detail in appellants' brief, appellees say that it does not involve Section 930(f) at all, and then turn around and say that *Paramino Lbr. Co. et al. v.*

Marshall, 309 U. S. 370, is governing, when we know that it too does not in any way concern Section 930(f) or whether a statute of limitations is retroactive in its effect when not so specified. The *Paramino Lbr. Co.* case certainly showed that the legislative intent was to make its order and decision retroactive only in that one case.

CONCLUSION.

The Deputy Commissioner or his Commission had no jurisdiction over the claim of Mr. Steffen and Section 930(f) of the Longshoremen and Harbor Workers' Act was not retroactive in its effect.

If there was any compensable disability, there was compensable disability for at least three days in February, 1938.

Section 913 of the Longshoremen's Act does not say that there must be disability for which one is entitled to compensation for it to be said an injury occurs or for the starting of the time against the filing of a claim, for therein it is stated:

> "The right to compensation for disability under this act shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment."

The right to compensation therefore does not depend on when there is disability for which compensation would be payable, but when there was an injury with the knowledge that there was an injury and a continuation of the knowledge there had been an injury, whether it be accompanied by subsequent disability or not. This point has been evaded definitely by appellees, and we say goes to the crux of the situation because, as appellants have pointed out in their opening brief and herein, it is the date of injury from which the time begins to run. Mr. Steffen knew he was injured in February, 1938, and continued to suffer and doctor up to the time he filed his claim in January, 1941. Any right to compensation Mr. Steffen had flowed from the event of February, 1938, and not the fact that he quit work again in August, 1938.

The order of the Deputy Commissioner should be set aside and appellee Steffen ordered to take nothing.

Dated, San Francisco,
October 23, 1944.

Respectfully submitted,
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